

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)
)
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

CC Docket No. 96-61

**REPLY COMMENTS OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

The Commonwealth of the Northern Mariana Islands ("Commonwealth"),¹ by its attorney and pursuant to the Commission's Public Notice released October 10, 1997,² hereby replies to the comments regarding the petitions for reconsideration, forbearance and clarification filed by various commercial mobile radio service ("CMRS") providers and trade associations in the above-captioned matter.

I. INTRODUCTION

The Commonwealth generally concurs with the Comments filed by the State of Alaska ("Alaska") and the State of Hawaii ("Hawaii"). Like Alaska and Hawaii, the Commonwealth disagrees with the petitioners' claims that Section 254(g) was not intended to encompass CMRS, an argument which twists the letter and intent of Section 254(g). The Commonwealth agrees with

¹ This Opposition is filed by the Office of the Governor on behalf of the people of the Commonwealth.

² See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Public Notice, Report No. 2232 (Oct. 10, 1997).

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Alaska and Hawaii that as providers of interexchange telecommunications services, CMRS providers had full notice and an opportunity to comment in this rulemaking. The Commonwealth supports the opposition of Alaska and Hawaii to granting “forbearance” to the CMRS providers, not only on the basis that such forbearance is unjustified but also due to the wholesale failure of the petitioners to show that such forbearance will not lead to unreasonable discrimination against remote, insular points. Lastly, the Commonwealth does not oppose limited clarification to accommodate the ownership structures of the CMRS industry.

II. SECTION 254(g) REQUIRES THE RATE INTEGRATION OF CMRS

The Commonwealth strongly disagrees with the claims made by AT&T Wireless Services, Inc. (“AWS”), Comcast Cellular Communications, Inc. (“Comcast”) and U S West, Inc. (“U S West”) that the rate integration of CMRS is “inconsistent” with Section 254(g) of the Telecommunications Act of 1996 (“1996 Act”). The Commonwealth agrees with the Comments submitted by Hawaii and Alaska that Section 254(g) clearly applies to all providers of telecommunications services without exception and without limitation to a particular group of services or locations.

CMRS providers are by definition providers of “interstate interexchange telecommunications services” within the meaning of the statute. As the Commonwealth has previously indicated,³ the 1996 Act broadly defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the

³ See Opposition of the Commonwealth to Motion for Stay of Enforcement of PrimeCo Personal Communications, LP, CCB/CPD 97-54, at 3-4 (filed Sept. 29, 1997).

public, regardless of the facilities used.”⁴ Consistent with this definition, the Communications Act of 1934, as amended, further defines “commercial mobile service” as “any mobile service . . . that is provided for profit and makes interconnected services available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission[.]”⁵ It is therefore apparent that “commercial mobile service” is encompassed under the definition of “telecommunications service” and must therefore be included in rate integration.

Despite the 1996 Act’s broad-based definition of “telecommunications” and the Commission’s past consideration of the issue, AWS and Comcast nonetheless argue that Section 254(g) was intended “solely to preserve the status quo,” which they claim excluded the rate integration of CMRS. See AWS Comments at 2 and Comcast Comments at 3-4. Similarly, U S West claims that Section 254(g) was intended to integrate only services which had previously been encompassed in rate integration. See U S West at 4. The Commonwealth disagrees. These spurious attempts to diminish Section 254(g) ignore the plain wording of the statute, distort congressional intent, and represent a self-interested attempt to carve out an unwarranted exemption for CMRS providers. As Alaska and Hawaii correctly point out in their Comments, Section 254 of the 1996 Act was intended to expand the Commission’s universal service programs and extend their benefits to all U.S. points (including the Commonwealth, which had previously been excluded).⁶ Read in

⁴ See 47 U.S.C. at § 153(46).

⁵ See id. at § 332(d)(1).

⁶ See Alaska at 3-4 and Hawaii at 4-5; see also H.R. Conf. Rep. No. 104-458 at 131, reprinted in 1996 U.S.C.A.A.N. 124, 143-44 (“Conference Report”)(specifically discussing Congress’ intent

proper context, Section 254(g) demonstrates Congress' intent that the policy of rate integration be included within this new, inclusive and expansive universal service program. Moreover, the arguments voiced by AWS, Comcast and U S West ignore Section 254(g)'s broad and undifferentiated requirement that all rates for all interexchange services be rate integrated, and that all U.S. consumers enjoy the benefits of such a policy. As the literal terms of Section 254(g) provide:

Within 6 months after the date of enactment of the [1996 Act], the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.⁷

This language allows for no exceptions. As the Commission has continually recognized, fulfilling Section 254(g)'s requirements therefore requires the Commission to expand its existing rate integration policies to encompass all U.S. points.⁸ In addition, as the Commission has clarified,

that the FCC's universal service programs be expanded to include "insular areas" such as the Pacific Island territories"). Concerning Section 254(g), the Conference Report states that, "[N]ew Section 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers (emphasis added)." Section 254(g)'s inclusion within Congress' expanded universal service programs, together with the reference to subscribers "throughout the Nation," demonstrate Congress' intent that the Commission's previous rate integration policies were to be broadened to encompass the Commonwealth and other previously excluded areas of the U.S.

⁷ 47 U.S.C. § 254(g).

⁸ See Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Dkt. No. 96-61, Report and Order, 11 FCC Rcd 9564, 9588 (1996) ("Report and Order") and Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Dkt. No. 96-61, First Memorandum Opinion and Order on Reconsideration, FCC 97-269, at ¶ 13 (released July 30,

such policies require the rate integration of all interexchange services.⁹

Contrary to Comcast's assertions, the Commission has ruled that non-traditional, non-wireline services such as CMRS qualify as interexchange services and were subject to rate integration prior to issuing the Reconsideration Order in this docket. See Comcast Comments at 4-5. Specifically, the Commission ruled in its Report and Order that the wireless services provided by American Mobile Satellite Corporation ("AMSC") must be rate integrated.¹⁰ This ruling is directly on point, and refutes the claims that the Commission's decision to include CMRS was a new, arbitrary, or ill-considered regulation. As Alaska points out, the Reconsideration Order is therefore consistent both with the Report and Order's ruling and with the Commission's treatment of other types of interexchange carriers in this proceeding. See Alaska Comments at 6.

As Hawaii additionally notes in its Comments, CMRS providers provide an interexchange service and were therefore subject to rate integration prior to the enactment of the 1996 Act, even if their noncompliance was never expressly prosecuted or ruled unlawful by the Commission.¹¹ See Hawaii Comments at 4. Previous noncompliance with rate integration is therefore no excuse for present noncompliance, and the Commission must accordingly reject the arguments of AWS, Comcast and U S West that rate integration's "traditional" boundaries prevent the rate integration

1997)("Reconsideration Order").

⁹ See Report and Order at 9588 and Reconsideration Order at ¶ 18.

¹⁰ See Report and Order at 9589.

¹¹ See In the Matter of AMSC Subsidiary Corp. Tariff F.C.C. No. 3, Order, 8 FCC Rcd 2871 (1993)(declining to rule AMSC price structure "patently unlawful"). As the Commission has explained, this decision "did not establish any policy of excluding AMSC services from rate integration." See Report and Order at 9589.

of CMRS pursuant to Section 254(g).

III. THE DECISION TO INCLUDE CMRS IN RATE INTEGRATION WAS INFORMED AND PROCEDURALLY PROPER

The Commonwealth strongly agrees with Alaska and Hawaii that the Commission's decision to include CMRS within its rate integration policies was both informed and procedurally proper. See Alaska Comments at 7-9 and Hawaii Comments at 3-7. The Commission previously rejected arguments to the contrary in its October 2, 1997 Order concerning PrimeCo Personal Communications, LP's motion for stay of rate integration,¹² and should therefore do so again.

Comcast asserts that even if Section 254(g) allows the Commission to include CMRS in rate integration -- as it does -- the Commission gave insufficient notice to the CMRS providers, preventing them from filing comments.¹³ ASW and U S West variously argue that the Commission's decision to include CMRS in rate integration was cavalier, was made without "lawful" notice, and is without satisfactory justification. See AWS at 2-3 and U S West at 3. These claims are simply untrue and are contradicted by the record.

It is established that under Section 553 of the Administrative Procedure Act ("APA"),¹⁴ an agency must provide sufficient factual detail and rationale for a proposed rule to permit interested

¹² See Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Dkt. No. 96-61, Order, ¶¶ 19-21 (released Oct. 3, 1997).

¹³ See Comcast Comments at 3-4. Specifically, Comcast claims that "[i]t is uncontroverted that in response to the [Commission's] Notice in this proceeding, *not one party* filed comments addressing the complex and novel issue of CMRS rate integration" (emphasis in original)." Id.

¹⁴ See 5 U.S.C. § 553(b)-(c).

parties to comment meaningfully.¹⁵ In the instant case, the Commission could not have done so in a manner that was much broader or more obvious to the telecommunications industry. As Alaska correctly notes in its Comments, the Commission's March 25, 1996 Notice of Proposed Rulemaking ("NPRM") proposed adopting the broad and inclusive rule that "a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in every other State," and specifically requested comment from interested parties.¹⁶ See Alaska Comments at 7-8. Since CMRS providers are clearly providers of "interstate interexchange telecommunications services," as discussed supra at 2-6, and since this proposal closely tracked the language of Section 254(g), the NPRM should have served as more than sufficient notice to the CMRS providers that the proposed rule would affect them.

It is also a matter of record that CMRS providers such as AMSC Subsidiary Corporation ("AMSC") and Vanguard Cellular Systems submitted comments in the Commission's rulemaking.¹⁷ In fact, in a request which the Commission expressly rejected in the Report and Order,¹⁸ AMSC requested that the Commission forbear from requiring CMRS providers to participate in rate integration. See AMSC Comments at 1-4 (April 19, 1996). Moreover, as Alaska points out in its Comments, the Petition for Reconsideration and Clarification which GTE Service Corp. ("GTE")

¹⁵ See, e.g., Florida Power and Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

¹⁶ See Implementation of Section 254(g), Notice of Proposed Rulemaking, 11 FCC Rcd 7141, 7181 (1996).

¹⁷ See Report and Order at Appendix A.

¹⁸ See Report and Order at ¶¶ 52-54.

filed on September 16, 1997 in this docket addressed the applicability of rate integration to its CMRS operation. See Alaska Comments at 9. These filings by CMRS providers further demonstrate that the CMRS industry had full and adequate notice of the Commission's intent to address CMRS in this rulemaking, and that Section 553 of the APA has been satisfied.

IV. THE COMMISSION CANNOT FORBEAR FROM APPLYING RATE INTEGRATION TO CMRS

The Commonwealth opposes the claims of AWS and U S West that the Commission should “forbear” from applying rate integration to CMRS, both as a matter of law and a matter of policy. See AWS Comments at 5-6 and U S West Comments at 6-8. Similarly, the Commonwealth believes the Commission should not “exempt” CMRS -- as suggested by U S West -- in the face of Section 254(g)'s explicit mandate that all interexchange services be included within rate integration. Such “forbearance” and “exemption” requests fly in the face of the very purpose of rate integration, would harm consumers living in rural and high cost areas of the U.S., and are contrary to the public interest.

The Comments submitted by Alaska and Hawaii demonstrate that the petitioners have not demonstrated how forbearance concerning CMRS would protect consumers living in offshore points from unreasonable discrimination, and have therefore failed to satisfy the Commission's three-part test for regulatory forbearance.¹⁹ While the Commonwealth will not repeat these arguments here, the Commonwealth agrees with Alaska and Hawaii that rate integration is necessary precisely because competition will not erase cost-driven rate disparities between different geographic regions of the U.S. See Hawaii Comments at 10-12 and Alaska Comments at 10-11. The Commonwealth's well-documented experience of disproportionately high, discriminatory interexchange rates prior to

¹⁹ See 47 U.S.C. § 160.

the Commonwealth's inclusion in rate integration stands as a case in point,²⁰ and demonstrates that the "forbearance" demands of the CMRS providers would clearly produce results which would violate Section 254(g).

**V. THE COMMONWEALTH DOES NOT OPPOSE CLARIFICATION
REGARDING THE APPLICATION OF RATE INTEGRATION TO CMRS**

Like Alaska and Hawaii, the Commonwealth is sensitive to the competitive issues presented by the ownership arrangements in the CMRS industry. Thus, clarification of how rate integration applies to CMRS would appear to be appropriate.

The Commonwealth agrees with Alaska's proposal that the Commission clarify that CMRS providers that are controlled by more than one ultimate parent company (and those parent companies are not otherwise commonly controlled) not be required to rate integrate. See Alaska Comments at 14. However, like Alaska, the Commonwealth believes that CMRS operations that are controlled by the same single entity should be required to integrate their interstate interexchange service rates.

Like both Alaska and Hawaii, the Commonwealth disagrees with AirTouch's proposal that rate integration requirements only apply to entities that are identically owned.²¹ No justification whatsoever is advanced for this proposal, and rate integration should apply to all entities that are controlled by a single and common parent company. As the Commonwealth has continually pointed

²⁰ See Petition for Rulemaking to Implement Domestic Rate Integration for the Commonwealth, AAD 95-84 (filed June 7, 1995); Comments of the Commonwealth, CC Dkt. No. 96-61, at 2-7 (filed Apr. 19, 1996); and Reply Comments of the Commonwealth, CC Dkt. No. 96-61, at 4-9 (filed May 3, 1996).

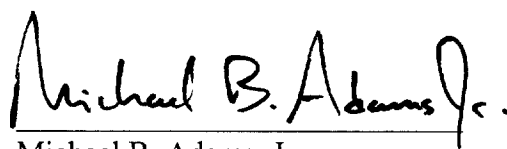
²¹ See Alaska Comments at 15; see also Hawaii Comments at 24 (explaining that "the important issue is control, not whether the control is based on 'identical' ownerships interests or on ownership by a 'single' company").

out, requiring telecommunications companies to institute rate integration across corporate affiliates is critical to the success of rate integration,²² and the Commonwealth fears that applying rate integration to CMRS providers only when they are “identically” owned risks artful, evasatory tactics by providers. The Commonwealth also agrees with Alaska that commonly controlled PCS and cellular operations should be required to integrate their interstate, interexchange rates. See Alaska Comments at 14-15.

VI. CONCLUSION

As the initial comments of Alaska and Hawaii demonstrate, all of the petitions for reconsideration and forbearance should be denied. The Commonwealth, however, is not opposed to limited clarification to accommodate the ownership structures of the CMRS industry in accordance with the foregoing.

Respectfully submitted,



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²² See, e.g., Opposition of the Commonwealth to Motion for Partial Stay or Request for Extension of GTE at 2-5 (June 27, 1997).

CERTIFICATE OF SERVICE

I, Michael B. Adams, Jr., an attorney with the Law Offices of Thomas K. Crowe, P.C., hereby certify that a copy of the foregoing Reply Comments was sent by first class United States mail, postage pre-paid, or by hand delivery where indicated by an asterisk (*), this 10th day of November, 1997, to the following:

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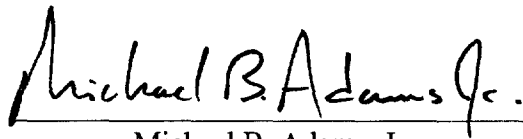
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